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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JANET LIERENZ, *Petitioner*

vs.

MAX BOWEN,
REGAN L. LUTZKO,
ROBERT J. HILL,

Respondents

On Petition for Writ of Certiorari to the
Erie County Court of Appeals of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an appellate court deprives a non-appealing party of a substantial property right when it dismisses her cause of action because of a defect in the caption of the pleadings, where: 1) she had received no notice that the action might be dismissed; 2) the trial court had found and ruled that there was no defect; and 3) the pleading defect would have been curable had the appellate court remanded the case to the trial court. U.S. Const. Amend. XIV, Section 1.

Whether an appellate court deprives a non-appealing party of her right to trial by jury when it reverses judgment on a jury's unanimous verdict in favor of the non-appealing party and dismisses that party's cause of action because of a curable pleading defect. U.S. Const. Amend. VII; U.S. Const. Amend. XIV, Section 1.

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PETITION FOR WRIT OF CERTIORARI TO THE ERIE COUNTY COURT OF APPEALS OF OHIO

JANET LIERENZ respectfully petitions for a writ of certiorari to review the judgment of the Erie County Court of Appeals of Ohio in this case.

OPINIONS BELOW

The unpublished written opinion of the Erie County Court of Appeals of Ohio appears in ***Appendix A*** to this Petition. The unpublished ruling of the Ohio Supreme Court appears in ***Appendix J*** to this Petition.

JURISDICTION

The Erie County Court of Appeals of Ohio entered its judgment on January 14, 1994. The Ohio Supreme Court entered its judgment on June 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *"

Article I, Section 16 of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The Seventh Amendment to the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Article I, Section 5 of the Ohio Constitution provides: "The right of trial by jury shall be inviolate,

except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

STATEMENT OF THE CASE

Background

Petitioner's cause of action arose in 1985 out of a contract dispute between Karl R. Lierenz, deceased, and the Respondents d/b/a Crown Motel. In April 1988, Petitioner Janet Lierenz, duly appointed executrix of her late husband Karl's estate, filed a lawsuit against Respondents.

The civil lawsuit was filed and maintained in the ***Erie*** County Court of Common Pleas. Karl Lierenz' Last Will was probated in the ***Huron*** County Probate Court. Petitioner was the sole legatee under her late husband's Last Will.

In February 1990, the trial court granted Respondent's motion for summary judgment and dismissed Petitioner's complaint. Petitioner filed a timely notice of appeal.

While the appeal was pending, Petitioner's probate attorney filed a final accounting in the probate court. The probate court filed an entry approving and settling the account and discharged Petitioner from her duties as executrix of her late husband's estate. In March 1991, the court of appeals reversed the trial court's ruling and reinstated Petitioner's complaint.

The trial court's ruling which was assigned as error in the appellate court

In January 1992 – ten months later – Respondents filed a motion to dismiss Petitioner's complaint on the ground that she lacked authority to maintain the litigation.[1] Petitioner opposed the motion, and in March 1992, the trial court denied Respondents' motion.[2]

Trial

Trial commenced on July 6, 1992. The parties presented evidence, testimony and argument for three days. After more than three hours of deliberation, the jury returned a unanimous verdict in favor of Petitioner and against all Respondents.

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[1] Respondents claimed that Petitioner's civil contract claim was barred by the doctrine of *res judicata* because the probate court had settled and approved the final account. Of course, there was neither identity of parties nor identity of issues between the probate court and the common pleas court.

[2] The trial court properly denied Respondents' motion. Respondents were neither creditors nor beneficiaries of the probate estate – they were debtors. The trial court recognized the absurdity of relieving Respondents of their liability on a civil contract claim because the estate to which the Respondents were liable – and which Respondents had refused to pay – had listed their account as uncollectible.

On October 8, 1992, upon Petitioner's motion, the Huron County Probate Court vacated its prior order and reinstated Petitioner as executrix. Shortly thereafter, on November 12th, the Erie County trial court entered judgment on the jury's verdict of July 9th.

Appeal to the Erie County Court of Appeals

Respondents filed a notice of appeal in the Erie County (Sixth District) Court of Appeals of Ohio. In their sole assignment of error, Respondents claimed that the trial court erred in overruling their motion to dismiss the complaint. Petitioner filed a notice of cross-appeal, and asserted in her assignment of error that the trial court erred in not granting her motion for prejudgment interest.

On January 14, 1994, the Erie County Court of Appeals issued its written Decision and Judgment Entry, reversing the trial court and dismissing Petitioner's cause of action. In its two-to-one decision, the majority found that Petitioner "was no longer the executrix of the estate and did not have the authority to maintain an action on behalf of the estate."[3] *Appendix A.*

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[3] The majority improperly focused its analysis on the proceedings in the Huron County Probate Court and, upon its implicit finding that the probate court had improperly reinstated Petitioner as executrix, completely disregarded the probate court's order of reinstatement. Judge Melvin L. Resnick filed a dissenting opinion, the full text of which is contained in *Appendix A.*

Appeal to the Ohio Supreme Court

On February 14, 1994, Petitioner filed a timely jurisdictional notice of appeal to the Ohio Supreme Court. *Appendix B.*

Upon motion, the court granted Petitioner an extension motion to file her *Memorandum in Support of [Ohio] Supreme Court Jurisdiction* (hereinafter, "*Memorandum*"). On Friday, April 15, 1994, Petitioner filed a timely second motion for extension of time, requesting fourteen days within which to file the *Memorandum.* The court denied the motion in an entry dated Monday, April 18th.[4]

On April 26, 1994, Petitioner filed a motion for leave to file the *Memorandum* instanter. *Appendix F.* At the same time, Petitioner filed her *Memorandum* in the Ohio Supreme Court. *Appendix G.*

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[4] Petitioner's motions for extension of time may be found in *Appendix C* and *Appendix D*, respectively. The court's entry denying Petitioner's second motion may be found in *Appendix E.* The entry was received at Petitioner's counsel's office on April 19th, while said counsel was out of the state of Ohio. Counsel returned to Ohio on Sunday, April 24th and shipped the completed *Memorandum* via Federal Express on Monday, April 25th – six days after receiving the court's entry.

Federal Questions Raised in the *Memorandum in Support of [Ohio] Supreme Court Jurisdiction*

Petitioner raised both state and federal constitutional issues in her *Memorandum in Support of Ohio Supreme Court Jurisdiction.* Specifically, Petitioner asserted that the appellate court's dismissal of her cause of action violated her right to due process and her right to trial by jury.[5] The Ohio Supreme

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[5] In her *Memorandum*, Petitioner presented four (4) Propositions of Law. Propositions 1 and 3 state:

> Proposition 1: A court of appeals deprives a party of her right to due process under the due process clause of U.S. Const. Amend. XIV, Section 1, and the due course of law provision of O. Const. Art. I, Section 16, when it orders the dismissal of the non-appealing party's cause of action because of a technical defect in the complaint, where the non-appealing party was under no duty to cure the defect at the trial court level.
>
> Proposition 3: A court of appeals deprives the non-appealing party of her right to trial by jury when it reverses judgment on the jury's verdict and orders the dismissal of the non-appealing party's cause of action because of a purely technical pleading defect.

Court refused to consider the merits of Petitioner's appeal.[6]

On May 2, 1994, Petitioner filed a motion requesting reconsideration of the court's denial of Petitioner's second motion for extension of time. *Appendix H.* Respondents never objected to any of Petitioner's motions[7]. Nevertheless, on June 8, 1994, the Ohio Supreme Court denied both motions and dismissed the entire cause of action. *Appendix I.*

REASONS FOR GRANTING THE WRIT

The Erie County Court of Appeals of Ohio deprived Petitioner of her chose in action when it dismissed her case -- without any notice whatsoever that her case was subject to dismissal. Petitioner's chose in action is a property right subject to all the procedural safeguards afforded by the Due Process Clause of Section 1, Amendment XIV to the United States Constitution.

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[6] Respondents never objected to Petitioner's motions, and Respondents neither claimed nor would have suffered prejudice by the granting of Petitioner's motion for leave to file the *Memorandum* instanter.

[7] In fact, on June 6, 1994, Respondents filed a memorandum in opposition to Petitioner's *Memorandum in Support of Supreme Court Jurisdiction.*

I. **An appellate court deprives a non-appealing party of a substantial property right when it dismisses her cause of action because of a defect in the caption of the pleadings, where: 1) she had received no notice that the action might be dismissed; 2) the trial court had found and ruled that there was no defect; and 3) the pleading defect would have been curable had the appellate court remanded the case to the trial court. U.S. Const. Amend. XIV, Section 1.**

State-created property interests are afforded protection under the Due Process Clause

Several times this Court has held that a chose in action is a constitutionally recognized property interest. **PHILLIPS PETROLEUM COMPANY v. SHUTTS**, 472 U.S. 797, 105 S. Ct. 2956, 2972; **LOGAN v. ZIMMERMAN BRUSH COMPANY**, 455 U.S. 422 at 428, 102 S. Ct. 1148 at 1154 (1982); **MULLANE v. CENTRAL HANOVER BANK & TRUST CO.**, 339 U.S. 306 at 313, 70 S. Ct. 652 at 656 (1950). A state may not constitutionally deprive a party of a state-created property interest with providing appropriate procedural safeguards. **LOGAN v. ZIMMERMAN BRUSH COMPANY**, 455 U.S. at 432, 102 S. Ct. at 1156.

The State of Ohio has conferred upon its citizens the right to seek redress in its courts:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

O. Const. Article I, Section 16. The State of Ohio has also conferred upon its citizens the right to trial by jury, which right, "being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree." O. Const. Article I, Section 5; **GIBBS v. GIRARD** (1913), 88 Ohio St. 34, ¶2, Syllabus by the Court.

"The [United States Supreme] Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." **LOGAN v. ZIMMERMAN BRUSH COMPANY**, 455 U.S. at 429, 102 S. Ct. at 1154. The "property" component of the Fifth Amendment's Due Process Clause imposes "constitutional limitations upon the power of courts,

> even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

Id. "Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be

'the equivalent of denying them an opportunity to be heard upon their claimed rights.'" *Id.*; *accord*, **BODDIE v. CONNECTICUT**, 401 U.S. 371 at 380, 91 S. Ct. 780 at 787.

The case at bar

The instant case was tried to a jury which returned a unanimous verdict in Petitioner's favor. Respondents appealed, but their sole assignment of error addressed the trial court's ruling on a technical, non-jurisdictional pleading matter. The error claimed was one of form rather than substance.[8]

The Erie County Court of Appeals filed its judgment entry dismissing Petitioner's cause of action. At no time prior to its entry of dismissal had the appellate court informed Petitioner that her case may be dismissed. The appellate court's action deprived Petitioner of her rights to redress in the court and trial by jury.

The appellate court's actions deprived Petitioner of due process

"The action of state courts in imposing penalties or depriving parties of other substantive rights without

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[8] Whether Petitioner proceeded personally or in her capacity as executrix in no way altered the nature of the claim against the Respondents. It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action.

providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment." **SHELLEY v. KRAEMER**, 334 U.S. 1 at 16, 68 S. Ct. 836 at 843; *accord*, **BRINKERHOFF-FARIS TRUST & SAVINGS CO. v. HILL**, 281 U.S. 673, 50 S. Ct. 451 ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.")

Due Process requires *meaningful* notice and the opportunity to be heard *before* property a party is deprived of a property interest

At a minimum, the words of the Fourteenth Amendment's Due Process Clause "require that deprivation of . . . property by adjudication be ***preceded*** by notice . . ." [Emphasis added] **ARMSTRONG v. MANZO**, 380 U.S. 545 at 550, 85 S. Ct. 1187 at 1190; *accord*, **MULLANE v. CENTRAL HANOVER BANK & TRUST CO.**, 339 U.S. at 313-14, 70 S. Ct. at 656-57 (1950); **BODDIE v. CONNECTICUT**, 401 U.S. 220 at 379, 91 S. Ct. 780 at 786 (1971) (A root requirement of the hearing required by due process is that an individual "be given an opportunity for a hearing ***before*** he is deprived of any significant property interest.")

The notice "must be of such nature as reasonably to convey the required information [citation omitted] and it must afford a reasonable time for those interested to make their appearance." *Id.* The Court has consistently held:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is ***notice reasonably calculated, under all the circumstances, to apprise interested parties*** of the pendency of the action ***and afford them an opportunity*** to present their objections. [citations omitted] [Emphasis added]

Id. "***'The right to be heard has little reality or worth unless one is informed' that a decision is contemplated.***" [Emphasis added] **BURNS v. UNITED STATES**, 111 S. Ct. 2182, 2186; *accord*, **MULLANE v. CENTRAL HANOVER BANK & TRUST CO.**, 339 U.S. at 314, 70 S. Ct. at 657.

A simple remand with instructions to the trial court would have provided due notice and a reasonable opportunity to cure

In the case at bar, the appellate court's first and only "notice" to Petitioner was that court's final judgment terminating the case. At no time throughout the entire proceedings was Petitioner advised that her case might be dismissed.

In any event, the appellate court exceeded its jurisdiction by dismissing Petitioner's case. Even assuming, *arguendo*, the propriety of the court's finding -- that Petitioner was not the real party in interest -- neither it nor the trial court could have dismissed Petitioner's case.

Petitioner filed the complaint in this case as the executrix of the estate of her deceased husband. Petitioner's husband's Last Will provided that Petitioner was the sole legatee. Therefore, regardless of whether Petitioner maintained the action as the executrix or on her own behalf as a beneficiary, she was the real party in interest.

More importantly, Ohio Civ. R. 17(A), which specifically pertains to the issue of "real party in interest," expressly states that dismissal is not appropriate when the court finds that the action is not being maintained in the name of the real party in interest. Civ. R. 17(A) provides, in relevant part;

> * * * ***No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.*** Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. (emphasis added)

Directly on point with the instant case is the Staff Note to Civ. R. 17(A), which provides, in relevant part:

> The fourth sentence of Rule 17(A) is borrowed directly from a 1966 amendment of Federal Rule 17(a). ***Assume that an administrator under a void appointment sues in good faith. Under***

> ***Rule 17(A) the action is not dismissed; instead a reasonable time is permitted until the proper administrator can be substituted in order that justice might be done.*** The 1966 amendment of Federal rule 17(a) "codifies" the principle enunciated in ***LEVINSON v. DEUPREE***, 345 U.S. 648 (1953) and ***LINK AVIATION, INC. v. DOWNS***, 325 F.2d 613 (D.D.C. 1963). * * * Rule 17(A) simply states clearly that a proper real party in interest may be substituted without the actions being dismissed. (emphasis added)

In the case at bar, both the trial court and the Petitioner believed that the Janet Lierenz was the duly appointed executrix of the estate of her husband, Karl Lierenz. Had the trial court found that Mrs. Lierenz was acting under a void appointment, then presumably it would have given her a reasonable opportunity to cure the pleading defect by substituting the name of the real party in interest, as required by Civ. R. 17(A).

II. **An appellate court deprives a non-appealing party of her right to trial by jury when it reverses judgment on a jury's unanimous verdict in favor of the non-appealing party and dismisses that party's cause of action because of a curable pleading defect. U.S. Const. Amend. VII; U.S. Const. Amend. XIV, Section 1.**

The appellate court's judgment deprived Petitioner of her right to trial by jury

The Seventh Amendment to the United States Constitution provides, in relevant part:

> In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution also affords protection to Petitioner's state-created right to trial by jury under Article I, Section 5 of the Ohio Constitution. Article I, Section 5 provides:

> The right to trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

The case at bar

Petitioner's contract claim, which arose during 1985, was tried to a jury seven years later. The trial lasted three days. After three hours of deliberation, the jury returned a unanimous verdict in favor of Petitioner.

On review of a claimed pleading defect, the appellate court completely disregarded the jury's verdict and reversed the trial court's judgment on the verdict.

It is axiomatic that granting a directed verdict violates a party's right of trial by jury when there exists some evidence tending to prove material facts. A party's right of trial by jury is no less violated when a court – especially an appellate court -- reverses a judgment on a jury's verdict because of a curable technical pleading defect.

The appellate court's reversal of judgment on the verdict and its dismissal of Petitioner's cause of action violated the most fundamental of rights protected under both the United States and Ohio constitutions.

III. The appellate court can articulate no countervailing state interest to justify its dismissal of Petitioner's cause of action

The Petitioner's property interest in her chose in action far outweighs any conceivable interest of the state appellate court in terminating her case. On the record, both the appellate court's interest in dismissing the case -- and the Ohio Supreme Court's interest in refusing to entertain Petitioner's *Memorandum in Support of Jurisdiction* -- are, on the record, insubstantial and do not justify the actions taken by these courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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